

Toleration and exclusion: al-Shāfi‘ī and al-Ghazālī on the treatment of apostates

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An early theological dispute in Islam was the question of whether the grave sinner is an unbeliever and can therefore be killed. The question was related to the murder of the third caliph ‘Uthmān ibn ‘Affān in 35/656. In the spring of that year, malcontents from Egypt, Basra and Kufa proceeded to the capital Medina to complain about various matters.¹ Those who had a hand in the caliph’s killing during this revolt were sometimes later identified with the earliest Khārījites.² Indeed, some Khārījite groups developed a theology that could perfectly justify the killing of ‘Uthmān. All Khārījites shared the opinion that committing a grave sin leads to unbelief. The more radical groups held that if a believer becomes an unbeliever by committing a grave sin, he turns away from Islam and may be killed as an unbeliever.³ Of course, the less radical groups amongst the Khārījites did not accept this chain of argument and they rejected the murder of an unbeliever.⁴ But the moderates agreed that the status of a believer, which in those early days meant the membership of the community of Islam, was lost if a sin was committed or a key tenet on which the community agreed was denied. Membership of the community, according to Josef van Ess, is the oldest expression of Islamic soteriology.⁵

There has been strong opposition to the Khārījites from the very beginning. In legal and theological thought their antagonists first answered with the dogma of *irjā’*, the suspension of judgement on the grave sinner. When the first Mu‘tazilites appeared we find a synthesis of these two theological positions, a dialectical progression. The Mu‘tazilī theory of *al-manzila bayna l-manzilatayn* rendered both previous positions, i.e. the Khārījite and the Murji‘ite, obsolete and simultaneously preserved them; they became ‘sublated’ (*aufgehoben*) as Hegel would have put it in his theory of dialectics. In religious and legal practice, however, the intermediate position proved to be nothing other than the *irjā’*, the suspension of judgement on the unbelief of a Muslim. The Khārījī threat of a deadly persecution⁶ amongst the members of the community was thus permanently lifted.

Things are more complicated when it comes to the denial of a key tenet on which the community agrees. In recent years, accusations of blasphemy

¹ al-Ṭabarī, *Ta’rīkh al-umam wa-l-mulūk/Annales quos scripsit Abū Djafar Mohammad ibn Djābir at-Tabarī*, ed. M. J. de Goeje et al., 15 vols. (Leiden: E. J. Brill, 1879–1901) ser. 1, 2854ff. The sources on ‘Uthmān’s murder are collected in Wilferd Madelung, *The succession to Muhammad: a study on the early caliphate* (Cambridge: Cambridge University Press, 1997), 113–40, 373–8.

² On the connection between the murderers of ‘Uthmān and the early Khārījites, cf. W. M. Watt, *The formative period of Islamic thought* (Edinburgh: Edinburgh University Press, 1973), 9–14.

³ In effect the unbeliever (*kāfir*) is in this case an apostate. The connection between unbelief and apostasy is nowhere mentioned. This, however, must have been the legal connection, if one is sought. On this position cf. al-Ash‘arī, *Maqālāt al-Islāmiyyīn wa-khtilāf al-musallīm/Die dogmatischen Lehren der Anhänger des Islam* (ed. H. Ritter) (Beirut and Wiesbaden: Steiner Verlag, third edition, 1980) (Bibliotheca Islamica, 1), 86ff. On whether this was really the position of the radical Khārījite groups cf. Josef van Ess, *Theologie und Gesellschaft im 2. und 3. Jahrhundert Hidschra. Eine Geschichte des religiösen Denkens im frühen Islam*, 6 vols. (Berlin and New York: Walter de Gruyter, 1991–97), vol. 2, 613ff.

⁴ Cf. al-Ash‘arī, *Maqālāt*, i, 104f. and van Ess, *Theologie und Gesellschaft*, vol. 2, 224ff.

⁵ van Ess, *Theologie und Gesellschaft*, vol. 1, 8.

⁶ This is perhaps how the alleged *isti‘rād* of the Azāriqa should be translated; on *isti‘rād* cf. Charles Pellat in *Encyclopaedia of Islam, New Edition*, ed. H. A. R. Gibb, J. H. Kramers, E. Lévi-Provençal, J. Schacht et al. (Leiden and London: E. J. Brill, Luzac & Co.), 1954ff., vol. 4, 269.

(*sabb*) and apostasy (*irtidād*) against members of the Muslim community have become more widespread. These allegations have become an effective political and legal weapon in the hands of some radical Muslim groups and individuals. Consequently, the application of these two legal institutions in Islamic law has changed considerably over the past dozen or so years. There have been several cases in Muslim countries where judgements of apostasy from Islam have been passed on writers and artists and the alleged perpetrator persecuted by state authorities or by self-appointed guardians of the Muslim faith. The most public cases of such accusations of apostasy in the 1990s were those of Faraj Fawḍā and Naṣr Ḥāmid Abū Zayd in Egypt, Asim Nesin in Turkey and Taslima Nasrin in Bangladesh. The renewed use of the judgement against apostates was clearly prompted, or at least encouraged, by al-Khomaynī's *fatwā* against Salman Rushdie in 1989.⁷ The Anglo-Indian writer, however, was not only accused of apostasy, but of the more serious offence of blasphemy (*sabb*).⁸

Whilst the renewed use of the charge of apostasy has been examined in a number of recent articles,⁹ there is little literature on the emergence and application of this legal institution in the early periods of Muslim history. The early literature on the development and application of the charge of apostasy is dominated by Ignaz Goldziher's *Vorlesungen über den Islam*. Goldziher examined the culture of *taḳfīr* (i.e. the accusation that someone is an unbeliever, *kāfir*) within the Ash'arite school of theology and he tried to determine the meaning and legal consequences of this accusation. He held that a Muslim unbeliever is 'considered to be excommunicated'. If his unbelief (*kufr*) is sufficiently established and he is caught, he should be asked to repent and be given the chance to return to the community of Islam. If he does not do so, he is put to death.¹⁰ For Goldziher there seemed to be little historical development within this verdict. Furthermore, he did not distinguish between the status of an unbelieving Muslim and that of a Muslim apostate, and thus he neglected the dynamics of this legal institution.

According to an established view, which is shared by European scholars and Muslim legal authorities alike,¹¹ the law of apostasy has its origins in the

⁷ In an almost identical judgement of 1983, the Muftī of Jerusalem Sa'd al-Dīn al-'Alamī delivered a verdict on the apostasy of the Syrian president Ḥāfiẓ al-Asad, and just like al-Khomaynī six years later, called on all Muslims to carry out the death penalty. (Reinhard Schulze, *Geschichte der arabischen Welt im 20. Jahrhundert*. (Munich: C. H. Beck, 1994), 328; *al-Sharq al-Awsat*, 27 June 1983, 1.)

⁸ Cf. Heribert Busse, 'Salman Rushdie und der Islam', in *Geschichte in Wissenschaft und Unterricht* 4, 1990, 193–215.

⁹ Samil Khalil Samir, 'Le débat autour du délit d'apostasie dans l'Islam contemporain', in *Faith, power and violence*, ed. J. J. Donahue and C. W. Troll (Rome: Pontificio Istituto Orientale, 1998) (*Orientalia Christiana Analecta*) 115–40. Kilian Bälz, 'Submitting faith to judicial scrutiny through the family trial', in *Welt des Islams* 37, 1997, 135–55; Abdullahi Ahmed an-Na'im, 'The Islamic law of apostasy and its modern applicability: a case from the Sudan', in *Religion*, 16, 1986, 197–204; Navid Kermani, 'Die Affäre Abū Zayd: eine Kritik am religiösen Diskurs und ihre Folgen', in *Orient* (Opladen), 35, 1994, 25–49 and Kermani's introduction to the German translation of Naṣr Ḥāmid Abū Zayd's 'Naqd al-khiṭāb al-dīnī', *Kritik des religiösen Diskurses*, trans. C. Magdi. (Frankfurt am Main: dipa-Verlag, 1996), 9–22.

¹⁰ Ignaz Goldziher, *Vorlesungen über den Islam*. (Heidelberg: C. Winter, 1910), 182. Goldziher refers to his study on *taḳfīr* published in the introduction to Ibn Tūmart, *Le livre de Mohammed ibn Tūmert, Mahdi des Almohades. Texte arabe, accompagné de notices biographiques et d'une introduction par I. Goldziher*, (ed. J. D. Luciani and M. al-Kamāl). (Algiers: Imprimerie Orientale Pierre Fontana, 1903), 54–63; and published separately as Ignaz Goldziher, *Mohammed ibn Tūmert et la théologie de l'Islam dans le nord de l'Afrique au XIe siècle*. (Algiers: Imprimerie Orientale Pierre Fontana, 1903), 54–63. Cf. also Ignaz Goldziher, *Muhammedanische Studien*, 2 vols. (Halle: S. M. Niemeyer, 1889/90), vol. 2, 215f.

¹¹ For Muslim literature on the development of the law of apostasy cf. Maḥmūd Shaltūt, *al-Islām, 'aqīda wa sharī'a*. (Beirut and Cairo: Dār al-Qalam, 14th edition, 1408/1988), 280f.; 'Abd al-Qādir 'Awda, *al-Tashrī' al-jinā'ī al-Islāmī muqāraran' bi-l-qānūn al-waḍ'ī*, 2 vols. Beirut: Mu'assasat al-Risāla, 1949, third edition, 1986, vol. 1, 534–8, 706–30; 'Abd al-Razzāq Nu'mān al-Sāmarrā'ī, *Aḥkām al-murtadd fī l-sharī'a al-Islāmiyya*. Beirut: Dār al-'Arabiyya li-l-Ṭibā'a

first century of Muslim history. No judgement on apostates is mentioned in the Quran, but the legal basis for the death penalty is expounded in two prominent *ahādīth*. The Muslim sources hand down the allegedly Prophetical decision that (1) anybody who changes his or her religion shall be killed, and that (2) apostasy is one of the three offences deserving capital punishment.¹² These two most important sources for the judgement on apostates are supported by a small number of *ahādīth* which confirm that following the death of Muḥammad, the companions of the Prophet did apply the death penalty to those who broke away from Islam.

Subsequent contributions that followed in Goldziher's footsteps represented the Muslim legal literature on the judgement of apostates in a way that did little to uncover a historical development in this element of Muslim jurisprudence.¹³ Although it is widely acknowledged that there was never a unanimous

wa-l-Nashr wa-l-Tawzī', 1387/1968; Muḥammad Abū Shuhba, *al-Hudūd fī l-Islām wa-muqāranaṭihā bi-l-qawānīn al-waḍ'iyya*. Cairo: al-Hay'a al-'Amma li-Shu'ūn al-Maṭābī' al-Amīriyya, 1394/1974, 297ff.; Muḥammad Abū Zahra, *Falsafat al-uqūba fī l-fiqh al-Islāmī*. Cairo: Ma'had al-Dirāsāt al-'Arabiyya al-'Āliyya, n.d., 192–208; Maḥmūd Fu'ād Jādallāh, *Ahkām al-hudūd fī l-sharī'a al-Islāmiyya*. (Cairo: al-Hay'a al-Miṣriyya al-'Amma li-l-Kitāb, 1403/1984), 135–51; Ibrāhīm Ahmad Waqfī, *Tilka hudūd Allāh*. Cairo: Maṭba'at al-Ma'rifa, second edition, 1979, 267–78 and Abdur Rahim, *The principles of Muhammadan jurisprudence according to the Hanafī, Maliki, Shafi'i and Hanbali School*. (London and Madras: Luzac & Co., 1911), 249–54.

¹² 'Ikrima, a pupil of Ibn 'Abbās who died 105/723 in Mecca, transmits the following *ḥadīth*: 'Alī burned people, who deflected from Islam. As this news reached Ibn 'Abbās he said: "I would not have burned them in fire, because God's Messenger said: "Do not punish with God's punishments." I had killed them according to the words of God's Messenger. Because the Messenger of God said: "You shall kill him, who changes his religion."' (*man baddala dīnahu fa-qatalūhu*, cf. Abū Dāwūd, *al-Sunan fī l-ḥadīth*, ed. M. 'A. al-Sīr, 5 vols. Homs: Muḥammad 'Alī al-Sayyid, 1388–94/1969–74, vol. 4, 521, *ḥudūd* I). This *ḥadīth* is quoted in one of the earliest collections of *ahādīth*, the *al-Muwattā'* of Mālik ibn Anās as: 'You shall chop off the head of him who changes his religion' (*man ghayyara dīnahu fa-dribū 'uqalūhu*; Mālik ibn Anas, *al-Muwattā'*, recension of Yahyā ibn Yahyā al-Laythī, ed. M. F. 'Abd al-Bāqī. (Cairo: Kitāb al-Sha'ab, n.d.), 458; *aqḍiya* 18). The second *ḥadīth* appears in the controversial setting of the murder of 'Uthmān ibn 'Affān 35/656. 'Uthmān's last words are reported in a *ḥadīth*: 'Uthmān said: "Indeed, they threaten to kill me! Why do they (want) to kill me? I heard God's Messenger saying: 'The blood of a Muslim man may only be shed in one of the three following cases. If a man commits fornication while he is *muḥṣan* he shall be stoned to death. Or when a man kills another man, or if a man breaks away after he had confessed to Islam'"' (Ibn Māja, *al-Sunan*, ed. M. F. Abd al-Bāqī, 2 vols. (Cairo: Dār Iḥyā' al-Kutub al-'Arabiyya, 1372–73/1952–53), vol. 2, 847, *ḥudūd* I; similarly in Ahmad ibn Hanbal, *al-Musnad*, ed. A. al-Bābī al-Halabī, 6 vols. (Cairo: al-Maṭba'a al-Maymuniyya, 1311–13 (1893–95), vol. 1, 63.) The core of this *ḥadīth*, the Prophetical saying: 'The blood of a Muslim man may only be shed ...' appears in two other versions handed down by Ibn Mas'ūd and 'A'isha. (Abū Dāwūd, *al-Sunan*, vol. 4, 522, *ḥudūd* I; al-Bukhārī, *Le recueil des traditions Mahométanes*, ed. M. L. Krehl and T. W. Juynboll, 4 vols. (Leiden: E. J. Brill, 1862–1908), vol. 4, 317, *diyāt* 6, and 322, *diyāt* 22; Ahmad ibn Hanbal, *al-Musnad*, vol. 1, 63; vol. 4, 181, 205, 214 and Ibn Māja, *al-Sunan*, vol. 2, 843f., *ḥudūd*, I.) Some of these versions vary considerably in the meaning of the circumstances under which the apostate is liable to capital punishment. On this case of legal divergence and development within the corpus of *ḥadīth*-literature cf. pp. 58–66 of my book: Frank Griffel: *Apostasy and Toleration in Islam. Die Entwicklung zu al-Gazālīs Urteil gegen die Philosophie und die Reaktionen der Philosophen* (Leiden: E. J. Brill, 2000), (Islamic Philosophy, Theology and Science. Texts and Studies, 40).

¹³ Cf. the articles 'Murtadd' by Willi Heffening in the first edition of the *Encyclopaedia of Islam*, ed. M. T. Houtsma, T. W. Arnold, R. Basset *et al.*, 4 vols. (Leiden and London: E. J. Brill, Luzac & Co., 1913–34), vol. 3, 736–8, reprinted unchanged and without additions in the second edition (1993), vol. 7, 635f. The most important contribution on the subject is still Rudolph Peters and Gert J. J. de Vries, 'Apostasy in Islam', in *Welt des Islam*, 17, 1976/77, 1–25, which examines the judgement on apostates in Muslim jurisprudence valid for all the centuries of Islamic law and provides an overview of earlier literature on the subject. Joel L. Kraemer, 'Apostates, rebels and brigands', in *Israel Oriental Studies*, 10, 1980, 34–73 attempts to detect developments within the sources. For further contributions cf. Sami A. Aldeeb Abu-Sahliā, 'Le délit d'apostasie aujourd'hui et ses conséquences en droit arabe et musulman', in *Islamochristiana/Dirāsāt Islāmiyya Masīhiyya*, 20, 1994, 93–116, and in the same issue of this periodical, pp. 75–91, Mahmoud Ayoub, 'Religious freedom and the law of apostasy in Islam'; Syed Barakat Ahmad, 'Conversion from Islam', in *The Islamic world from classical to modern times: essays in honor of Bernhard Lewis*, ed. C. E. Bosworth, C. Issawi, R. Savory and A. L. Udovitch. (Princeton: Darwin Press, second edition, 1991), 3–25; H'mida Ennaïfer, 'De la foi à la conscience d'un paradoxe. Un cas de conflit entre le droit d'origine révélée et les droits de l'homme: le châtiement en cas d'apostasie

consensus amongst Muslims on the criteria necessary to constitute apostasy, the procedure for dealing with apostates, once an agreement on the apostasy of a Muslim has been reached, seemed to be the same through all periods of Islamic history.

But authors such as Goldziher faced a problem when they tried to reconcile the observation that only a very small number of executions took place with the legal principle of capital punishment in all cases of apostasy. Goldziher therefore assumed that the death penalty was only theoretical and seldom enforced, while all other sanctions against apostates, such as the confiscation of their belongings, were real.¹⁴ However, a closer examination of the relevant literature on the subject shows that there were very significant differences in the application of the judgement on apostates during the first five centuries of Muslim history. A comparison between al-Shāfi'ī's position and that of al-Ghazālī illustrates that the judgement on apostates could in one case, as analysed by Goldziher, be used to persecute heterodoxy, while in another period this would have been impossible.

(1) *al-Shāfi'ī* (d. 204/820)

The most important element in the development of the law of apostasy is the *istitāba*, i.e. the invitation to repent and to return into the community of Muslims. The *istitāba* constitutes a right of the accused apostate, since he is given the chance to be reinstated to his previous status as a Muslim as if nothing had happened and with no punishment whatsoever. The *istitāba*, however, did not enjoy general acknowledgement amongst Muslim jurists. In the early period of Muslim jurisprudence its legitimacy was to some degree problematic. Since no judgement on apostates is mentioned in the Quran, the *istitāba* does not figure there. Within the *ḥadīth* corpus it can only be found in a small number of *aḥādīth* which claim to witness the application of the judgement on apostates by the companions of the Prophet. It is not mentioned in any of the Prophetical *aḥādīth*.

Nonetheless, the *istitāba* was generally accepted amongst the early Muslim jurists of Kufa by the time there was a critical approach to the sources of law

d'Islam (le ridda)' in: *Foi et justice: un défi pour le christianisme et pour l'Islam*/GRIC Groupe de Recherches Islamo-Chrétien. (Paris: Centurion, 1993), 104–13; Majid Khadduri, *The law of war and peace in Islam. A study of Muslim international law*. (Baltimore: The Johns Hopkins Press, second edition, 1955), 149–52; Adel Theodor Khoury, *Toleranz im Islam*. (Munich: Kaiser, 1980), (Entwicklung und Frieden. Wissenschaftliche Reihe, 22), 110–15; *idem.*, *Der Koran. Arabisch-Deutsch. Übersetzung und wissenschaftlicher Kommentar*. (Gütersloh: Gütersloher Verlagshaus Gerd Mohn, 1990ff.), vol. 1, 94–8; Johannes Schwartländer (ed.): *Freiheit der Religion. Christentum und Islam unter dem Anspruch der Menschenrechte*. (Mainz: Matthias Grunewald, 1993), (Forum Weltkirche: Entwicklung und Frieden, 2), 64–71, 102–7. For an earlier examination of the judgement on apostates cf. Charles Hamilton, *The Hedaya or guide. A commentary on the Mussulman laws*, 4 vols. (London: W. H. Allen, second edition, 1870), vol. 1, 225–46; Carl Eduard Sachau, *Muhammedanisches Recht nach Schafitischer Lehre*. (Stuttgart and Berlin: W. Spemann, 1897), 843–6; Theodoor Willem Juynboll, *Handleiding tot de kennis van de Mohammedaansche Wet volgens de leer der Sjafi'itische School*. (Leiden: E. J. Brill, 1903), revised German translation: *Handbuch des islamischen Gesetzes nach der Lehre der schafi'itischen Schule nebst einer allgemeinen Einleitung*. (Leiden/Leipzig: E. J. Brill/Otto Harrassowitz, 1910), 300f.; David Santillana, *Istituzioni di diritto musulmano malichita con riguardo anche al sistema sciafiita*, 2 vols. (Rome: Istituto per l'Oriente, 1925–38), vol. 1, 167f.; Guillaume Frédéric Pijper, *Fragmenta islamica: Studien over het Islamisme in Nederlandsch-Indie*. (Leiden: E. J. Brill, 1934), 79–94 and Léon Bercher, 'L'apostasie, le blasphème et la rébellion en droit Musulman malékite', in *Revue Tunesienne*, 30, 1923, 115–30. From the perspective of Christian missionaries cf. Samuel M. Zwemer, *The law of apostasy in Islam*. (London: Marshall Brothers, 1924); *idem.*, 'The law of apostasy', in: *Moslem World*, 14, 1924, 373–91 and F. H. Ruxton, 'The convert's status in Maliki law', in: *Moslem World*, 3, 1913, 37–40.

¹⁴ Cf. Goldziher in Ibn Tūmart, *Le livre de Mohammed ibn Tūmert*, 56f., in his *Mohammed ibn Tūmert et la théologie de l'Islam dans le nord de l'Afrique au XIe siècle*, 56f. and in his *Vorlesungen über den Islam*, 182f.

at the end of the second/eighth century. But in the process of this increasing *ḥadīth* criticism, the most important support claimed for the *istitāba*, a comment by 'Umar ibn al-Khaṭṭāb on the legal practice of two companions of the Prophet,¹⁵ was eliminated. Although the legal institution of the *istitāba* was at least theoretically weakened by the elimination of its most important pillar, it still had the approval of the doctors of law in Kufa and to some extent in Medina as well.

The early authors of *fiqh* in the second/eighth century, from both Medina and Kufa, devoted a significant portion of their comments on the law of apostasy to the question of whether apostates who conceal their breaking-away from Islam should be given the right to repent, or whether they forfeit this right by their clandestine action. All early jurists acknowledged that an apostate who refused to repent and return to Islam should be put to death. The debate centred on the legal rights of secret apostates. The early authors from Kufa as well as those from Medina used the word *zindīq* to describe a secret apostate.¹⁶ The meaning of this word changed considerably in later centuries, but in the early legal texts—at least up until al-Shāfi'ī—*zindīq* is used in the sense of a suspected apostate who conceals his (supposed) apostasy behind a public profession of Islam.

The discussion amongst the early Muslim jurists of the second/eighth century on the legal rights of a *zindīq* can be followed in al-Shāfi'ī's *Kitāb al-Umm*, where he reports that among the jurists and scholars of his era the universal application of the *istitāba* was disputed.¹⁷ According to al-Shāfi'ī, there were three positions among the Muslim jurists. The first group of scholars held that an apostate who was born a Muslim should be treated differently from a convert to Islam who later returned to his religion of birth. Only the latter should be given the right to repent, because a born Muslim—thus the line of argument within this group—who knows from the early days of his

¹⁵ Two companions of Muḥammad, Abū Mūsā 'Abdallāh ibn Qays al-Ash'arī (d. after 41/661) and Mu'adh ibn Jabal (d. 18/639) were sent to different regions of the Yemen in 10/631. They are said to have met one day, and Abū Mūsā presented Mu'adh with an apostate. The latter—according to one version of the story—insisted on the immediate execution (al-Bukhārī, *Le recueil*, vol. 3, 156, *maghāzī* 60) while according to another version both companions granted the right of *istitāba* and asked the accused three times to repent (Abū Dāwūd, *al-Sunan*, vol. 4, 526, *ḥudūd* 1). Mālik ibn Anas mentions a comment by 'Umar ibn al-Khaṭṭāb on the former version of events: 'Did you not jail him for three days and give him daily only a loaf of bread and call on him to repent? He would probably have repented and have returned to God's command. O my God, I was not present, I did not order this and I am not pleased, since it was reported to me!' (Mālik ibn Anas, *al-Muwattā'*, 459, *aqḍiya* 18). 'Umar in this *ḥadīth* is presented as the responsible caliph, but since he came to power only after Mu'adh left the Yemen soon after 10/632 this *ḥadīth* was probably rejected for chronological reasons by the increasingly critical *ḥadīth* science. Abū Yūsuf does not quote it in a list of statements by companions of the Prophet on the necessity of the *istitāba* (Abū Yūsuf Ya'qūb al-Ansārī, *Kitāb al-Kharāj*, (Cairo: al-Maṭba'a al-Salafiyya wa-Maktabatuhā, second edition, 1352 (1933–34), 180)). Later Ibn Sa'd (d. 230/845) in his *Kitāb al-Tabaqāt al-kabīr* attributes a similar comment to the Umayyad caliph 'Umar II (Ibn Sa'd, *Biographien Muhammads, seiner Gefährten und der späteren Träger des Islams*, ed. E. Sachau et al., 9 vols. (Leiden: E. J. Brill, 1904–21), vol. 5, 258f.) and as a tradition on the companions of Muḥammad it no longer appears.

¹⁶ Cf. Mālik ibn Anas, *al-Muwattā'*, 459, *aqḍiya* 18 and Abū Yūsuf, *Kitāb al-Kharāj*, 179f.

¹⁷ This discussion is within the 'Book on *ḥadd*-legislation and on the legal specifications about (the punishment of) banishment' ('Kitāb al-Ḥudūd wa-sifat al-naḥy'). al-Shāfi'ī, *Kitāb al-Umm*, 7 vols. (Cairo: al-Maṭba'a al-Kubrā al-Amīriyya, 1321–25 (1903–08), vol. 6, 145–65). Ibn al-Nadīm in his *Kitāb al-Fihrist* (ed. R. Tajaddod. Tehran: Marvi Printing, 1393/1973, 264; English translation by G. Dodge, *The Fihrist of al-Nadīm, a tenth century survey of Muslim culture*, 2 vols. New York: Columbia University Press, 1970, vol. 1, 517) mentions a 'Kitāb al-Murtadd al-kabīr' ('The long book on the apostate') and a 'Kitāb al-Murtadd al-ṣaghīr' ('The short book on the apostate') amongst the works of al-Shāfi'ī. The collectors of al-Shāfi'ī's works may have put the former into the chapter 'Bāb al-murtadd al-kabīr' ('Long chapter on the apostate') within the *Kitāb al-Ḥudūd*. A 'short chapter' does not exist. On legal questions related to apostasy cf. also 'Kitāb al-Qitāl ahl al-baghy wa-ahl al-ridda', in *Kitāb al-Umm*, vol. 6, 133–47 and a passage within 'Kitāb al-Jizya' (vol. 4, 82–133), 105.

youth that apostasy entails capital punishment should not be given the right to return to Islam unharmed. These scholars regarded the breakaway of a Muslim who was born as such as the most severe case of apostasy.

A second group of scholars had different priorities. This group held that an apostate who conceals his true religion is the most reprehensible of all. Mālik ibn Anas (d. 179/796) was the most prominent advocate of this direction of thought. He judged that *zanādiqa* should not be asked to repent and should not be given the right to return to their former status because they lacked credibility in their public statements.¹⁸ Mālik ibn Anas' position was supposedly aimed at Arab Bedouins who still held to the polytheistic faith of their ancestors. Al-Shāfi'ī reports this viewpoint, which in his generation had its followers amongst some scholars of Medina:

Another scholar amongst them says: 'I call upon him who returns to a religion to which he confesses publicly, like Judaism or Christianity to repent. If he repents, I receive him (unharmed), if he does not repent, I kill him. If he returns to a religion which is kept secret, like *zandaqa*, and (the truth) comes out I kill him. And when he professes his return (to Islam) publicly I do not accept it. And I judge all people equal, be they born Muslims or not'.¹⁹

The position of some scholars in the Ḥijāz ignored a serious legal problem, which grew with the large number of conversions to Islam in Syria, Iraq and Iran.²⁰ The dating of conversion to Islam still poses a number of problems, but it may be assumed that the mass conversions amongst the populace of Iraq began roughly twenty years before al-Shāfi'ī wrote this text soon after the middle of the second/eighth century. Unlike the conversions of earlier periods, the change of religion was no longer a choice made by individuals, since by now entire village communities had to convert to Islam in order to change their taxation status.²¹ It may be assumed that this process frequently led to conflict since new Muslims were torn between allegiance to their traditional religion and professing publicly to Islam. This conflict could not really be reconciled and we must assume that many newly converted Muslims continued to practise their pre-Islamic religions, albeit secretly. In fact, there is evidence from this period which indicates that while professing Islam in public, people continued to practise their pre-Islamic religions in secret.²² If all these cases of secret apostasy were judged according to the quoted legal viewpoint, this would have led to a wave of executions among the newly converted peasants. Al-Shāfi'ī rejected this position. In his opinion—which is the third in his list—every apostate should be given the option of returning to the community of Islam without harm:

We agree with a number of scholars from Medina, from Mecca, from the Eastern Countries and from other regions that nobody should be killed who professes publicly his return (to Islam). (And we agree) that those Muslims who were born as such should be treated equal with those who were not born as Muslims and (those who) have a religion which they do

¹⁸ Mālik ibn Anas, *al-Muwatta'*, 459, *aqdiya* 18.

¹⁹ al-Shāfi'ī, *Kitāb al-Umm*, vol. 6, 156.

²⁰ Cf. Majid Khadduri, *The Islamic law of nations. Shaybānī's Siyar*. (Baltimore: The Johns Hopkins Press, 1966), 23.

²¹ Richard W. Bulliet, *Conversion to Islam in the medieval period: an essay in quantitative history*. (Cambridge, MA: Harvard University Press, 1979), 82.

²² For the case of Zoroastrianism cf. Jamsheed Kairshasp Choksy, *Conflict and cooperation. Zoroastrian subalterns and Muslim elites in medieval Iranian society*. (New York: Columbia University Press, 1997), 69–93, 84–6, 106–9.

profess publicly or who have a religion which they keep secret. This is all (the same) unbelief.²³

According to al-Shāfi'ī the only criterion for distinguishing between a Muslim and an apostate is the public profession of Islam by pronouncing the most basic Islamic creed. Whoever pronounces the *shahāda* and thereby confesses his belief in one single God and in Muḥammad as His messenger was regarded by al-Shāfi'ī as a Muslim. For al-Shāfi'ī it mattered neither how often he broke away from Islam before he pronounced this sentence nor how often he had saved his own life by lip service:

The public proclamation of one's faith (*iẓhār al-īmān*) protects one's life indiscriminately in both of the following cases: that someone (1) professes his faith publicly, who is (in fact) still an idolater, and (2) that someone professes publicly, then commits idolatry after he has professed publicly (his Islamic faith) and then again professes publicly his faith.

Whichever sort of unbelief it is, secret unbelief, or unbelief which is publicly professed (there is no difference).²⁴

In this decision al-Shāfi'ī follows in the footsteps of the legal scholars from Kufa. His justification for the universal application of the *istitāba* to all cases of apostasy is, however, considerably different from the one given by his predecessors. Most of the jurists in the two generations before al-Shāfi'ī referred in their justification of the *istitāba* to *aḥādīth* which describe the legal practice of the companions.²⁵ In contrast to the legal traditions of Medina and Kufa, al-Shāfi'ī regarded the *aḥādīth* about the actions of companions as only a very minor source of law²⁶ and he did not accept them as sufficient justification of the legal institution of the *istitāba*. Some earlier jurists did refer to the practice of the Prophet. Abū Yūsuf Ya'qūb (d. 182/798), for instance, justified the general application of the *istitāba* by referring to a number of *aḥādīth* in which the Prophet himself urged his followers not to kill anybody who professed the *shahāda*.²⁷ But even this did not seem sufficient for al-Shāfi'ī and he recognized that there is still the prominent and well-recorded *ḥadīth* in which the Muslim community is ordered to kill *all* apostates—without reference to any obstacles or hindrances. Within the collected corpus of the *ḥadīth* there are two contradictory strains which cannot be reconciled according to the pattern of a general rule and a special exception. Al-Shāfi'ī recognized that the institution of the *istitāba* cannot be unambiguously deduced from the reported sayings of the Prophet.

Consequently, al-Shāfi'ī does not refer to any *ḥadīth* for his justification of the legal institution of the *istitāba*. Instead he draws entirely upon verses from the Quran. But since the judgement regarding apostates is itself not mentioned anywhere in the Quran, the problem arises of legitimizing the *istitāba* from quotations in which it is not mentioned. Al-Shāfi'ī can only draw upon the

²³ al Shāfi'ī, *Kitāb al-Umm*, vol. 6, 156.

²⁴ *Ibid.*, vol. 6, 145f.

²⁵ As mentioned, the *istitāba* itself does not appear in a *ḥadīth* of the sayings and actions of the Prophet, but only in those of his companions. Mālik ibn Anas derived the *istitāba* from the later rejected *ḥadīth* in which 'Umar responds and protests against the immediate killing of an apostate by the companions Abū Mūsā and Mu'ādh ibn Jabal. Other early authors referred to one of the two versions of the *ḥadīth* of Abū Mūsā and Mu'ādh ibn Jabal, in which the two give the apostate a sufficient chance to repent.

²⁶ Cf. Joseph Schacht, *The origins of Muhammadan jurisprudence*. Oxford: Clarendon, 1950, 77.

²⁷ Abū Yūsuf, *Kitāb al-Kharāj*, 180. In addition to this he quotes a number of traditions in which companions accept the necessity of the *istitāba*. He even provides a *ḥadīth* in which the Prophet legislates the *istitāba*. None of these reports is supported by a credible *isnād* and the Prophetical *ḥadīth* is criticized by al-Shāfi'ī in his *Kitāb al-Umm*, vol. 6, 160.

spirit of the Quran and he does so when he stresses that the Quran requires Muslims to fight their enemies, 'until only God is worshipped' or 'until the unbelievers are converted, perform the *ṣalāt* and pay the *zakāt*'.²⁸ Of course, these words in the Quran do not occur in the context of the law on apostates. They were intended to restrict the zeal of Muslim fighters who conquered a group of unbelievers who had never been Muslims. Of these people, all those who proclaimed their conversion publicly should remain unharmed. According to al-Shāfi'ī's reading of the Quran, this was even the case if the newly converted people remained secret unbelievers. Such secret unbelief would indeed constitute a case of secret apostasy from Islam and al-Shāfi'ī therefore feels entitled to apply these passages from the Quran as guidance for the judgement of apostates. Within the Quran it is promised that these groups of people will suffer a 'severe punishment' in the next world, but in this world they stay unharmed.²⁹ Consequently, al-Shāfi'ī argues that the Quran does not pass any judgement on apostates without giving them the chance to return to Islam.

On this point al-Shāfi'ī's reasoning is somewhat unconvincing. How can the *istitāba* be justified as a necessary institution for the Muslim community if the Quran does not pass *any* judgement on apostates that is to be executed by the Muslim community? Al-Shāfi'ī incorporates the absence of a quranic command to punish apostates into the decree—as it is expressed in the sayings of the Prophet—to penalize apostates with capital punishment. This method contradicts al-Shāfi'ī's own principle that a legal judgement should be derived from one source of law only.³⁰

Al-Shāfi'ī's justification of the application of *istitāba* in the case of secret apostates is to some extent more convincing. In this case al-Shāfi'ī refers to the Quran as a source of law. He evokes the memory of the struggle between the Muslims and the 'hypocrites' (*al-munāfiqūn*) within the earliest Muslim community. In the first verse in Sura 63, the *munāfiqūn*, the hypocrites (among the inhabitants of Medina) are described as people who professed to accepting the Prophet in public, whilst really they were liars. The source of the knowledge of the *munāfiqūn*'s true belief is God himself.³¹ In Sura 58 it is said, 'They have entrenched themselves behind their oaths (...) and they have to expect a humiliating punishment'.³² Al-Shāfi'ī stresses that the pronouncement of punishment for the hypocrites refers only to the next life. In this life there is no punishment for the *munāfiqūn*. The hypocrites hid behind their oaths to elude any punishment in this world and the Prophet accepted this. Al-Shāfi'ī then argues that the *munāfiqūn* in the Quran give the example for the judgement on the *zanādiqa* in his era:

God reports (...) on the *munāfiqūn* that they were believers and fell into unbelief after they had been believers. If they were questioned, they denied this and professed to be believers. They professed their belief and announced publicly their return (to Islam). Concerning the things that can only be dealt with between them and God, they stayed in unbelief. (...) God says (in the Quran), they are 'on the deepest ground of hellfire, you do not find any helpers for them'.³³ (...)

²⁸ al-Shāfi'ī, *Kitāb al-Umm*, vol. 6, 145. Al-Shāfi'ī refers to the verses 2.193 and 9.5 in the Quran.

²⁹ Al-Shāfi'ī refers to verses 2.217 and 39.65.

³⁰ al-Shāfi'ī, *al-Risāla*, ed. A. M. Shākir. Cairo: Sharikat Maktabat wa-Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī wa-Awladihī, 1358/1940, 112f.; cf. Schacht, *The origins of Muhammadan jurisprudence*, 15.

³¹ *Quran*, 63.1: 'God witnesses that the hypocrites lie'.

³² *Quran*, 58.16.

³³ *Quran*, 4.145.

(The judgement in the next world) follows this verse which determines that they will be on the deepest ground of hellfire, because they lied over their faith. The judgement in this world is according to what faith they profess publicly. If they entrench themselves behind lies they are safe from killing. If they keep their unbelief secret and profess to their faith publicly, then, according to the words of the Prophet as they are revealed in the Quran, the public profession saves them from capital punishment.³⁴

According to al-Shāfi'ī, this assessment is an evaluation of the Prophet's motives behind his decision on the *munāfiqūn*. The Quran stresses in several passages that nobody can judge the true belief ('the heart') of a fellow-Muslim. Al-Shāfi'ī follows this argument as it is expressed in the Quran and hints at the fact that this line of thinking is also contained in a Prophetical *ḥadīth*. Here the Prophet is believed to have said that according to the divine law the life of everybody is safe who professes his membership of Islam, even if only to be spared from capital punishment.³⁵ 'Islam' is understood by al-Shāfi'ī as a place of refuge that protects one from the accusation of being an apostate. Al-Shāfi'ī points out that God himself is the guardian and trustee (*walī*)³⁶ of this asylum and he will judge in a later trial what remains secret in this life. God is the only one who can know and judge the true beliefs of those who use this place of refuge.

However, the text of the Quran sets the *munāfiqūn* in a somewhat vague *locus poenitentiae*. Although the Quran does not impose capital punishment on the *munāfiqūn* and on apostates alike, there are a number of social sanctions which obstruct the life of the *munāfiqūn* amongst the earliest Muslims. In his equation of the quranic *munāfiqūn* with the *zanādiqa* of the second/eighth centuries, al-Shāfi'ī transfers these vague quranic sanctions to those who keep their apostasy secret. While his public profession to Islam secures the life of the assumed apostate, and while his blood in this case is protected, this is not the case for the freedom and the unharmed body of the *zindīq*. Al-Shāfi'ī writes:

If one meets somebody who is still an idolater but has publicly professed Islam—whichever is the case—this does not hinder using force against him. One may oppress him, take his freedom away from him, imprison him and do similar things that do not shed his blood. His blood is granted by (the profession of) his faith. (...) We may not kill him (only) on the suspicion that he does not believe.³⁷

Clandestine apostasy is not completely tolerated by al-Shāfi'ī, but it is treated entirely differently from the case of a public break from Islam. If someone declares his deflection from 'those whose blood is protected', and returns to 'those whose blood is allowed to be shed', he should be harshly punished and treated far more rigorously than a secret idolator. He is like an enemy upon whom war must be waged. According to al-Shāfi'ī such an apostate once knew the way to salvation but chose the path to doom.³⁸

Al-Shāfi'ī's understanding of the law regarding secret apostates led the way to a further division between the status of a Muslim (*muslim*) and that of a believer (*mu'min*) in Islamic theology. This distinction originally occurs in some late verses of the Quran.³⁹ Al-Shāfi'ī's view transferred those who publicly

³⁴ al-Shāfi'ī, *Kitāb al-Umm*, vol. 6, 146.

³⁵ Arabic: *lam yaslam illā muta'awwadhū min al-qatl bi-l-islām*; *ibid.*, vol. 6, 146.

³⁶ *ibid.*, vol. 6, 146.

³⁷ *ibid.*, vol. 6, 147.

³⁸ *ibid.*, vol. 6, 145.

³⁹ Most prominently in *Quran*, 49.14.

profess their allegiance to Islam into a legal body and guaranteed that within this community 'the blood is protected'. This legal body is not identical with the community of believers. However, in his wording al-Shāfi'ī tried to evoke a close correspondence between the community of believers and the community of those whose blood is protected. He uses the phrase 'those who are unbelievers having once believed' (*man kafara ba'da īmānihil*) to describe the legal case of apostasy. But from his statement of the law regarding apostates, it emerges that inner belief does not feature in al-Shāfi'ī's legal assessment of apostasy. The difference between the legal body of those who profess Islam and the believers becomes clear in the case of the *munāfiqūn*.⁴⁰ In the late Suras, especially in Sura 63, the *munāfiqūn* are enemies of the community of believers. In this Sura the status of the unbelieving hypocrites changes to that of rebels, and the Muslims are urged to fight against the *munāfiqūn* once they take part in any act of rebellion. In the legal thinking of al-Shāfi'ī the 'hypocrites' remain members of the protected legal body, because they profess Islam. If they take part in a rebellion they should be considered Muslim rebels, but they cannot be judged as unbelievers. Al-Shāfi'ī openly acknowledges that it is the outward claim of Islamic faith which guarantees membership of the community of Muslims.⁴¹

Al Shāfi'ī's understanding of the law on secret apostates may be regarded as the ultimate conclusion to emerge from a legal consideration developed under Murji'ī influence within the tradition of Kufa, which later developed into the Ḥanafī *madhhab*. The jurists of Kufa recognized the connection between the widely acknowledged institution of the *istitāba* and the toleration of secret apostasy. If all apostates are guaranteed the right to repent and return to Islam without punishment, then secret apostasy cannot be an offence punishable in this world. If the repentance of an accused apostate had to be accepted under any circumstances, then lip-service was sufficient to elude conviction. However, there is a significant difference between the legal reasoning of al-Shāfi'ī and the jurists from Kufa. The jurists from Kufa justified the universal application of the *istitāba* with a number of companion-*aḥādīth*. This legal method was rejected by al-Shāfi'ī. As there was insufficient ground for the establishment of the *istitāba* in the actions of the Prophet, al-Shāfi'ī referred to the Quran and incorporated the spirit of the revelation to the judgement on apostates.

Al-Shāfi'ī effectively distinguished between an apostate in the sense of the Shari'a and a Muslim unbeliever. If a Muslim secretly held a belief that diverged from Islam or if he performed the rites of another religion in secret, this made him—according to quranic principles—an unbeliever. But this unbelief was not a legal offence that was liable to capital punishment. The unbeliever would only become an apostate if he publicly announced his break from Islam and continued to do so, even after having his life threatened. This distinction is made in al-Shāfi'ī's legal reasoning, but it is not expressed in terms of a clear distinction between an 'unbeliever' and an 'apostate' in the Arabic language. In his use of legal terms, al-Shāfi'ī does not distinguish between a *murtadd* and a *kāfir* and argues that one cannot separate the concept of apostasy from unbelief, since the legal term 'apostasy' (*irtidād*) cannot be

⁴⁰ Al-Shāfi'ī uses the term 'public proclamation of faith' (*iẓhār al-īmān*), he never uses 'public proclamation of Islam'. The word *islām* as a description for the community of Muslims does not occur in his writings. Even the term 'if he was born in Islam' (*idha wulida 'alā l-islām*) is taken by al-Shāfi'ī only from the writing of another author, and he subsequently denies that this criterion has any significance in the case of the judgement on apostates.

⁴¹ al-Shāfi'ī, *Kitāb al-Umm*, vol. 6, 149. If in the case of mental illness the accused is not capable of professing the *shahāda*, al-Shāfi'ī advises expressing the words slowly in front of the accused, so that he might be able to repeat them.

understood without referring to the theological concept of unbelief.⁴² Al-Shāfi'ī uses the word 'unbelief' with a rather different meaning from that which is known from later authors or from the Quran. 'Unbelief' in the writing of al-Shāfi'ī implies the public announcement of an inward defection from the Islamic faith. In contrast, the 'apostasy' of a Muslim necessarily entails the outright refusal of the accused to return to Islam. According to al-Shāfi'ī, one may not speak of an 'apostate' unless the accused has failed to answer positively to attempts to return him to the community. Hence, the application of the legal term 'apostasy' is based on three necessary conditions: first, the apostate had to have once had faith according to al-Shāfi'ī's definition (meaning publicly professing to Islam); secondly there had to follow unbelief (meaning the public declaration of a breaking-away from Islam); and thirdly, there had to be the omission or failure to repent after the apostate was asked to do so. These three criteria constitute apostasy and all three are necessary to pass capital punishment on a Muslim, while the first two are sufficient to classify a Muslim as an unbeliever.

These three necessary criteria gained general acceptance within the Shāfi'ī and Ḥanafī schools. Within these two legal traditions this reasoning led to a far less severe application of the judgement on apostates than was the case in the Mālikite school.⁴³ The viewpoint within the Shāfi'ī and Ḥanafī schools meant that in the eastern part of the Muslim empire between the second/eighth and the fourth/tenth centuries, the law on apostasy could not be used to persecute heterodoxies. This situation did not change until in the middle of the fifth/eleventh century.

The necessity of the *istitāba* was generally accepted amongst the jurists of the Ḥanafī, Shāfi'ī and even the Ḥanbalī schools until at least the beginning of the fifth/eleventh century. Up until then, it had, in theory at least, been impossible to pass the death penalty on a supposed Muslim apostate who was not willing to die for his conviction. Some sources lead one to conclude that there were trends in third/ninth century Ḥanbalī legal thought which were to change this situation.⁴⁴ But since Ḥanbalism was only a minor *madhhab*, it depended on the general opinion within the Shāfi'ī school and it was not able to change the universal application of *istitāba* even within its own ranks.⁴⁵ The

⁴² al-Shāfi'ī, *Kitāb al-Umm*, vol. 6, 145.

⁴³ Mālik ibn Anas, *al-Muwatṭā'*, 459, *aqdiya* 18 judged that secret apostates should not be given the right to repent. This decision determined the treatment of heterodoxy in the Mālikī *madhhab*. Cf. al-Qādī 'Iyād ibn Mūsā al-Yahsūbī, *al-Shifā' bi-ta'rīf huqūq al-Mustafā*, ed. M. A. Qurrah 'Alī, U. al-Rifā'ī, J. al-Sirwān, N. Qurrah 'Alī and 'A. al-Sayyid, 2 vols. (Damascus: Dār al-Wafā' li-l-Ṭibā'a wa-l-Nashr, 1392 (1972)), vol. 2, 511f., 585–603; *idem.*, *al-I'lām bi-hudūd qawā'id al-Islām*, ed. M. ibn Tawīt al-Tanjī, Rabat: Maṭbū'āt Wizārat 'Umūm al-Awqāf wa-l-Shu'ūn al-Islāmiyya, n.d. (1969) (al-Silsila al-Dīniyya, 1), 81. The legal treatment of apostasy in the Mālikī tradition of al-Andalus is studied by María Isabel Fierro-Bello, *La heterodoxia en al-Andalus durante el periodo omeya*. Madrid: Instituto Hispano-Arabe de Cultura, 1987 (Cuadernos de islamología, 1); *eadem.*, 'Accusations of *zandaqa* in al-Andalus', in: *Quaderni di Studi Arabi*, 5–6 (1987–88), 251–8 and *eadem.*, 'Heresy in al-Andalus', in *The legacy of Muslim Spain*, ed. S. K. Jayyusi. Leiden: E. J. Brill, 1992 (Handbuch der Orientalistik. Erste Abteilung. Der Nahe und der Mittlere Osten, 12), 895–908.

⁴⁴ Cf. the doxographic report in al-Dārimī, *al-Radd 'alā l'jahmiyya*, ed. G. Vitestam. (Lund/Leiden: C. W. K. Gleerup/E. J. Brill, 1960), 101 on the legal approach of the early Ḥanbalī scholar al-Rabī' ibn Nāfi' Abū Tawba al-Ḥalabī (d. 241/855). Abū Tawba said: 'I had a dispute with Aḥmad ibn Hanbal on the question whether those Jahmites shall be killed. He said: "One has to ask for repentance (before one kills them)!" I said to him: "When it comes to their orators (*ḥutabā'*), it is not necessary to ask for repentance, but they may be slain (immediately)."' On Abū Tawba's legal opinion in this case cf. also Ibn Abī Ya'lā, *Tabaqāt al-ḥanābila*, selective text by al-Nabulūsi, ed. A. 'Ubayd. (Damascus: al-Maktaba al-'Arabiyya 1350 (1931–32), 115.

⁴⁵ Cf. the distinction made by the Ḥanbalī Ibn al-Baṭṭa (d. 387/997) between the criteria for belief and those for membership of the Muslim community in Henri Laoust (ed.), *La profession de foi d'Ibn Baṭṭa. Traditionaliste et jurisconsulte musulman d'école hanbalite mort en Irak à 'Ukbara en 387/997*. (Damascus: Institut Français de Damas, 1958), Arabic text p. 50; French translation p. 82f.

general acceptance of this legal situation is stressed by some attempts within the Ḥanbali *madhhab* to overrule the necessary application of the *istitāba* by using a legal trick. The Ḥanbali jurist al-Dārimī (d. 280/894) from Herat, for instance, developed a method against the traditional antagonists of the Ḥanbalis, the so-called Jahmites, whose teachings (in particular those on the created nature of the Quran) were considered apostasy amongst the Ḥanbalis. Al-Dārimī recommended that a Jahmite accused of apostasy should be asked to repent and then let go after he professed his allegiance to Islam. If he then continued to teach his apostasy, his repentance had proved to be invalid and he may be put to the sword without a further chance to repent.⁴⁶ Whether this understanding of the *istitāba* found many followers may be doubted, since al-Shāfi'ī pointed out that the repentance should be accepted in any case, no matter how often the accused had rejected Islam and afterwards returned to it.

(2) al-Ghazālī (d. 505/1111)

Three centuries after al-Shāfi'ī, al-Ghazālī put forward an argument which led to a very different criterion for the application of the law on apostates. Within the fifth/eleventh century there was a shift towards a more severe judgement. One of the first examples of this development was the 'Qādirī creed' (*al-i'tiqād al-qādirī*), a public announcement of the articles of faith published by the caliph al-Qādir in the eventful year of 409/1018. This creed is influenced by Ḥanbalī legal thought⁴⁷ and it contains a passage in which the position that the Quran is created is considered to be unbelief. In his pronouncement al-Qādir urges everybody who holds this opinion to repent publicly and to reject this view in their teachings. Those who do not repent are subsequently declared unbelievers, 'whose blood may be shed'.⁴⁸

Once again the application of the *istitāba* in the case of secret apostates is crucial in this development. The first two authors to argue in favour of the renouncement of *istitāba* in certain cases of apostasy were the Shāfi'ī jurist al-Māwardī (d. 450/1058) and his Ḥanbalī contemporary Abū Ya'īlā b. al-Farrā' (d. 458/1066), both writing in the middle of the fifth/eleventh century.⁴⁹ It seems to be the case that the two more tolerant schools of law, the Ḥanafis and the Shāfi'is, were increasingly influenced by attempts within the Ḥanbali school in Baghdad to use the judgement against apostates as a means to persecute heterodoxy. A second influence must be considered from the Māliki tradition which never accepted the necessary application of the *istitāba*.⁵⁰ Both al-Māwardī and Abū Ya'īlā were influential figures at the court and the chancellery of the caliph al-Qā'im, al-Qādir's successor in Baghdad and their views reflect the legal thinking at court. This change in legal reasoning was probably influenced by the successful second and third wave of the Ismaili *da'wā* in Iraq

⁴⁶ al-Dārimī, *al-Radd 'alā l-jahmiyya*, 102f.

⁴⁷ Cf. Laoust, *La profession de foi*, XCVI.

⁴⁸ The document of *al-i'tiqād al-qādirī* is handed down by Ibn al-Jawzī, *al-Muntaẓam fī l-ta'rīkh al-rusul wa-l-mulūk*, vol. 5–10. (Hyderabad: Dā'irat al-Ma'ārif al-'Uthmāniyya, 1358 (1938–39)), vol. 8, 109f. This document contains an *istitāba* which is just like the judgement on the apostasy of Jahmites also stressed in an earlier passage vol. 7, 289. The legal content of this document is analysed on pp. 121–36 of my book *Apostasy und Toleranz im Islam*.

⁴⁹ al-Māwardī, *al-Ahkām al-sultāniyya*. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1966), reprint Beirut n.d., 55–58; Abū Ya'īlā b. al-Farrā', *al-Ahkām al-sultāniyya*, ed. M. H. al-Faqī. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1357/1938), reprint Beirut 1403/1983, 51–5 and *idem.*, *Kitāb al-Mu'tamad fī uṣūl al-dīn*, ed. W. Z. Haddad. (Beirut: Dar al-Machreq, 1974), 273.

⁵⁰ al-Māwardī in his *al-Ahkām al-sultāniyya*, p. 55 quotes the example of Mālik ibn Anas as the most prominent argument in favour of the abandonment of the *istitāba* as a necessary presupposition in the judgement on apostates.

and Iran.⁵¹ Al-Ghazālī's writings go far beyond these two authors and he may be regarded as the ultimate stage in this development towards the application of the law on apostates against state enemies. Al-Ghazālī limited the obligatory application of the *isti'āba* to the case of 'ordinary people' and held that it was acceptable to kill propagandists and teachers of heterodoxy without granting them the right to repent. In al-Ghazālī's thinking, a Muslim unbeliever and a Muslim apostate became one and the same thing.

In one of his earliest works al-Ghazālī deals with the case of the secret apostate. This book, the *Shifā' al-ghalīl fī bayān al-shubah wa-l-mukhīl* ('The healing of passions through resolving of doubts and illusion') was written when al-Ghazālī was still in Nishapur under the influence of his teacher al-Juwaynī (d. 478/1085).⁵² The book expounds strategies to solve a number of legal problems that arose in the Shāfi'ī *fiqh* of that period. One of the major problems the book examines is the intentional exploitation of procedural law in favour of the defendant. Al-Ghazālī illustrates this problem with a number of legal examples, one of which is the intentional exploitation of the *isti'āba* in cases of apostasy. It was mentioned earlier that according to Shāfi'ī law, an accused apostate could not be sentenced as long as he was willing to profess the *shahāda*. This resulted in the sincerity of this profession being called into question. Al-Shāfi'ī's argument led to the conclusion that in *fiqh* any sceptical doubts about the sincerity of the public profession should be dismissed. This requirement was no longer considered valid at the end of the fifth/eleventh century. Al-Shāfi'ī's application of the principle of charity in the case of apostasy was for al-Ghazālī an exploitation of legal procedures. He discusses it under the heading of 'the repentance of the secret apostate' (*tawba al-zindīq*). Al-Ghazālī follows a general trend amongst his contemporaries and does not accept the *universal* obligation to grant the right of the *isti'āba*:

The meaning of 'repentance' of an apostate is his abandoning of his inner religion. The secret apostate (*zindīq*) does not give up his inner confessions when he professes the words of the *shahāda*. He may be killed for his unbelief because we are convinced that he stays an unbeliever who sticks to his unbelief.⁵³

Al-Ghazālī suspects that a secret apostate (*zindīq*) who had lied previously about his true religion, holds that a lie in religious matters is allowed.⁵⁴ He refers to the *taqiyya* as an element of Shii creeds. The *taqiyya* in fact made it possible for Shiites to deny their Shii allegiances in a situation of religious persecution. The early Ḥanafī and Shāfi'ī jurists took note of the *taqiyya* (literally: 'caution') without objecting to this practice.⁵⁵ Al-Ghazālī differs from this opinion and he justifies his decision that a secret apostate may be

⁵¹ On the Ismaili *da'wā* in the middle of the fifth/eleventh century cf. Farhad Daftary, *The Ismā'īlīs: their history and doctrines*. (Cambridge: Cambridge University Press, 1990), 202–22 and Verena Klemm, *Die Mission des fātimidischen Agenten al-Mu'ayyad fī 'd-dīn in Sīrāz*. (Frankfurt: P. Lang), 1989 (Europäische Hochschulschriften, Reihe 27; Asiatische und Afrikanische Studien: 24).

⁵² Cf. al-Ghazālī, *Shifā' al-ghalīl fī bayān al-shubah wa-l-mukhīl*, ed. H. 'U. al-Kubaysī. (Baghdad: Maṭba'at al-Irshād, 1390/1971), 8, where al-Ghazālī mentions and praises his teacher al-Juwaynī. The title of this book is copied from a book of al-Juwaynī. Cf. al-Juwaynī, *Shifā' al-ghalīl fī bayān mā waqā' fī l-tūrah wa-l-injīl min al-taḥdīl*, published in *Textes apologétiques de Juwaynī* (m. 478/1085), textes arabes traduits et annotés par Michel Allard. (Beirut: Dar al-Machreq, 1968), 99–176.

⁵³ al-Ghazālī, *Shifā' al-ghalīl*, 222. I read *bāṭin* instead of *bāṭil*.

⁵⁴ The same reasoning led Mālik ibn Anas three centuries earlier to the judgement that secret apostates should not be given the right to repent. (Mālik ibn Anas, *al-Muwattā'*, 459, *aqdiya* 18).

⁵⁵ Cf. Ignaz Goldziher, 'Das Prinzip der takijja im Islam', in *Zeitschrift der Deutschen Morgenländischen Gesellschaft* 60, 1906, 213–26, 213–7 and Joseph Schacht, *An introduction to Islamic law*. (Oxford: Clarendon, 1964), 118.

killed immediately with a reference to the lack of veracity of the public profession of a Shii. This decision opens the gate to sentencing apostates not only in the case of openly professed apostasy, but also in cases of supposed inward heterodoxies. While before the fifth/eleventh century apostasy was the outward profession of a break-away from Islam, it was now a supposedly heretical conviction or a heretical religious tenet. Unbelief, i.e. a heterodox conviction, could now be identified with apostasy and charged as such.

In several of his later writings al-Ghazālī points out that capital punishment may be applied even in the case of a proven inward conviction which is considered unbelief.⁵⁶ This opinion can be found in his early legal work:

The death penalty in the case of unbelief (*kufṛ*) is justifiable, because we believe in this case that he remains refractory in his unbelief.⁵⁷

This deviation from the principles of Islamic law established in the second/eighth century is even more astonishing, since al-Ghazālī acknowledges that the Prophet and his companions did not judge this way. According to al-Ghazālī the Prophet Muḥammad understood the confession to Islam to be only outward. This becomes clear in the case of the *munāfiqūn*. Al-Ghazālī writes that the Prophet declined to judge the *munāfiqūn* according to their inward confession and accepted them as members of the Muslim community. The same was true, al-Ghazālī points out, in the early days of Islam. After the companions of the Prophet had conquered foreign countries, they did not judge according to the inward confession.⁵⁸ The inner faith of the outwardly converted was not an issue in the early days of Islam.⁵⁹ On the basis of the judgement of the Prophet and his companions, al-Ghazālī accepts that the legal obligation to apply *istiṭāba* can only be dismissed if it is well established that *zandaqa* and apostasy are the case. If there are doubts about the unbelief of the accused, they should be given the right to repent and to return to Islam. In the case of the ‘ordinary people’ (*umūm al-nās*) such doubts are always justified and these people should therefore not be killed without being given the opportunity to repent.⁶⁰

This point is made clear in a later work of al-Ghazālī, the so-called *Sireitschrift* against the Bāṭinīs, *Fadā’ih al-bāṭiniyya wa faḍā’il al-mustaẓhiriyya*. The book was written during the year 487/1095 and it is a work directed against the quite successful *da’wā* of the newly emerged Nizārī Ismaili movement. It was ordered by the caliphal court of al-Mustaẓhir (reigned 487–512/1095–1118).⁶¹ Here al-Ghazālī reiterates his judgement that not only

⁵⁶ In his *Fayṣal al-tafrīqa*, written in around 504/1110, al-Ghazālī says ‘unbelief’ (*kufṛ*) is a legal term and makes the blood of the accused licit. In the context of this book it becomes clear that ‘unbelief’ means an inner conviction. Cf. al-Ghazālī, *Fayṣal al-tafrīqa bayna l-islām wa-l-zandaqa*, ed. S. Dunyā. (Cairo: Dār Iḥyā’ al-Kutub al-‘Arabiyya, 1381/1961), 134 and 197. (Cf. my German translation *Über Rechtgläubigkeit und religiöse Toleranz, Eine Übersetzung der Schrift Das Kriterium der Unterscheidung zwischen Islam und Gottlosigkeit*, eingeleitet, übersetzt und erläutert von Frank Griffel. (Zürich: Spur Verlag, 1998), 59f., 77.) For a similar statement cf. al-Ghazālī, *al-Iqtīṣād fī l-i’tiqād*, ed. H. Atay and I. Agâh Cubukçu. (Ankara: Nur Matbaası, 1962), (Ankara Üniversitesi İlahiyat Fakültesi Yayınları, 34), 246 and 248. This book was written soon after 488/1095.

⁵⁷ al-Ghazālī, *Shifā’ al-ghalīl*, 222.

⁵⁸ Cf. al-Ghazālī, *Shifā’ al-ghalīl*, 223: ‘After the flag of the Muslims had flown over a place in the countries of the unbelievers, its inhabitants converted to Islam because they stood in the shade of the swords and had been defeated by the Muslims and conquered.’ Cf. al-Ghazālī’s commentary on the application of the *ḥadīth* according to which Muḥammad was urged to fight against the unbelievers until they confessed the *shahāda* in his *al-Iqtīṣād fī l-i’tiqād*, 251.

⁵⁹ Cf. al-Ghazālī, *Fayṣal al-tafrīqa*, 203.

⁶⁰ al-Ghazālī, *Shifā’ al-ghalīl*, 221.

⁶¹ al-Ghazālī, *Fadā’ih al-bāṭiniyya wa faḍā’il al-mustaẓhiriyya*, ed. ‘A. Badawī. Cairo: al-Dār al-Qawmiyya li-l-Ṭibā’a wa-l-Naṣr, 1383/1964, 3.

apostasy, but unbelief itself is a legal offence.⁶² The Muslim judge considering the case does not have the option of leaving a Muslim unbeliever unharmed, of making him a slave or accepting the *jizya* from him. A Muslim unbeliever must be considered an apostate, and the judge is obliged to purify the surface of the earth from his presence.⁶³ Whether the unbelief remains secret or is made public in an open rebellion against the caliph makes no difference in the legal application of the judgement on apostates. If the unbelief of a Muslim is sufficiently established, every means to kill the unbeliever is permitted, even his assassination (*ightiyāl*). In the case of secret apostates there is no obligation to ask the accused to repent.⁶⁴ However, al-Ghazālī accepts the quranic principle that the heart is a place where only God can make out the true faith of a Muslim.⁶⁵ If the accused is 'someone from the mass of the people, who does not know things'⁶⁶ he should be granted the right to repent. Since it is known how easily ordinary people change their minds, they should be shown the sword, and if they return to the truth, this should be accepted, and they should be trusted.⁶⁷ But in the case of a *dā'ī* or anyone who spreads unbelief amongst the believers, there should be no forgiveness. According to al-Ghazālī, these people know that their teachings are not true and that their opinions are unbelief. The missionaries of the heretical movements only spread these heresies to gain political power and worldly possessions. In these cases it lies within the powers of the judge to grant the right of repentance or not.⁶⁸

According to al-Ghazālī, Islamic law cannot remain on the same level as it was in the times of the Prophets and his companions. It must not shy away from the threat posed to the Islamic community by the activities of secret apostates. Even in his statements in the *Shifā' al-ghalīl*, which were written before 481/1088, al-Ghazālī had the Ismaili danger in mind. In this early book, the change in Islamic law is openly justified by the interest of the state:

The consideration in all these cases should be led by an increase of the ruler's benefit.⁶⁹

Al-Ghazālī recognized that the Islamic law and its judgements on apostates provide a forceful weapon against the Ismaili heterodoxy which threatened the Seljuq state. His understanding of this law must be regarded as a political interpretation of the judgement on apostates. This is true not only for the legal regulations on how to carry out the judgement (the *furū'*), but also for the criteria for apostasy. In both of his *Streitschriften*—against the peripatetic philosophy (the *Tahāfut al-falāsifa*) and the Ismailis (the *Faḍā'ih al-bāṭiniyya*)—al-Ghazālī presents a catalogue of criteria for membership of the community

⁶² Cf. the eighth chapter in *Faḍā'ih al-bāṭiniyya*, 146–63. In Ignaz Goldziher's edition *Streitschrift des Gazālī gegen die Bāṭiniya-Sekte*. Leiden: E. J. Brill, 1916 (Veröffentlichungen der de Goeje-Stiftung, 3) this chapter is in Arabic (pp. 51–4); German paraphrase (pp. 71–3). The English translation in Richard McCarthy, *Freedom and fulfillment. An annotated translation of Al-Ghazālī's al-Munqidh min al-Dalāl and other relevant works of al-Ghazālī*. Boston: Twayne Publishers, 1980, 175–286, is only an excerpt and omits some important passages. Henri Laoust, *La politique de Ḡazālī*. (Paris: Librairie Orientale Paul Geuthner 1970), (Bibliothèque d'études islamique, 1), 356–64 analyses the chapter.

⁶³ al-Ghazālī, *Faḍā'ih al-bāṭiniyya*, 156; cf. *idem.*, *al-Iqtisād fī l-ʿitqād*, 247f.

⁶⁴ al-Ghazālī, *Faḍā'ih al-bāṭiniyya*, 156, 160.

⁶⁵ Cf. al-Ghazālī, *Ihyā' ʿulūm al-dīn*. 6 vols. Cairo: Lajnat Nashr al-Thaqāfa al-Islāmiyya, 1356–57 (1937–39), vol. 1, 31.

⁶⁶ Arabic: *min jumlat ʿawāmmihim wa-juhhālīhim*; al-Ghazālī, *Faḍā'ih al-bāṭiniyya*, 162.

⁶⁷ *ibid.*, 160.

⁶⁸ *ibid.*, 163. There is an interesting record of a case from this period in which a judge does not grant this right, while the accused Ismaili claims it. Cf. the trial on an apostate *dā'ī* from Khuzestan in Sha'bān 490/July 1097 led by the prominent Baghdadi Ḥanbalī jurist Ibn ʿAqīl, reported in Ibn al-Jawzī, *al-Muntazam fī l-taʾrīkh al-rusul wa-l-mulūk*, vol. 9, p. 103.

⁶⁹ al-Ghazālī, *Shifā' al-ghalīl*, 225.

of Islam.⁷⁰ The arguments in both of these works are brought together in his *Fayṣal al-tafrīqa* which he wrote towards the end of his life. Here he lays down that the apostasy of a Muslim depends on an epistemological argument. Deviation from any article of faith that is grounded on revelation is only allowed if one is able to advance a convincing argument that what is written in the revelation cannot be true in its wording. Using a number of sceptical objections, al-Ghazālī establishes in his *Tahāfut al-falāsifa* that there is no convincing argument that can contradict the wording of the Quran in the passages concerning three important fundamental elements of the Muslim creed (*uṣūl al-‘aqā’id al-muḥimma*).⁷¹ These three elements are: belief in eschatology as it is laid down in the Quran;⁷² belief in God’s creation of the world in time; and belief in God’s omniscience. According to al-Ghazālī there cannot be a convincing argument founded on reason to contradict these articles of faith, and since there is no other way than revelation to knowledge of these three questions, every Muslim must follow the wording of it concerning these three questions. Whosoever deviates from these three dogmas of Islam is considered an unbeliever and subsequently an apostate, and may be put to death.⁷³

Two of the three fundamental articles of faith which al-Ghazālī establishes have an important political significance. Al-Ghazālī regards God’s omniscience and the resurrection of the body in the afterlife as a necessary precondition for the enforcement of religious law amongst ordinary people. If doubts about God’s knowledge of man’s actions and his ability to impose bodily pain in the afterlife spread amongst the Muslims, the religious law may be disrespected. In his *al-Iqtīṣād fī l-‘itiqād* al-Ghazālī makes clear the connection that he sees between these two articles of faith and the obeying of the law. Here he repeats his condemnation of the *falāsifa*’s three propositions, and he continues:

Whoever claims this, annihilates the achievement of the religious laws, he sets limits to the possibility of receiving guidance from the light of the Quran and he hinders the forming of one’s own moral conduct according to the sayings of the Prophets.⁷⁴

Al-Ghazālī’s legal consideration to renounce the *istitāba* is an important prerequisite for his judgement on the apostasy of the peripatetic philosophers and the Ismailis. As long as every accused apostate was given the right to repent and return to Islam, it was not necessary to distinguish between a tolerated deviation from some minor articles of faith and apostasy. The accused could always deny what was considered apostatic deviation and pronounce what was asked from him, then return to his heterodox teaching, and then, when he was again accused, pronounce what was asked from him, and so on.

⁷⁰ al-Ghazālī, *Tahāfut al-falāsifa*, ed. S. Dunyā. Cairo: al-Hay’a al-Miṣriyya al-‘Āmma li-l-Kitāb, sixth edition, 1392/1972, 307–9; *idem.*, *Faḍā’ih al-bāṭiniyya*, 151–5.

⁷¹ al-Ghazālī, *Fayṣal al-tafrīqa*, 191.

⁷² i.e. predictions of a *bodily* resurrection in the next life, cf. *Quran*, 6.22–4, 19.66–72, 23.99–118, etc.

⁷³ al-Ghazālī, *Fayṣal al-tafrīqa*, 197.

⁷⁴ al-Ghazālī, *al-Iqtīṣād fī l-‘itiqād*, 250.